ENG MAN HIN & ANOR

v.

KING'S CONFECTIONERY SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[COMPANIES WINDING UP PETITION NO: D5-28-697-2005]
25 FEBRUARY 2006

COMPANY LAW: *Winding up - Petition under s. 218 Companies Act, 1965 - Elements to be proven by petitioner - "Ebrahimi" type of company - Specific identifiable legitimate expectation of entitlement to management control - Breach of legitimate expectation which is just and equitable to restrain*

COMPANY LAW: *Winding up - Just and equitable grounds - "Ebrahimi" principles - "Quasi-partnership" company formed or continued on basis of personal relationship involving mutual confidence - Agreement or understanding that all or some of shareholders shall participate in management - Restriction upon transfer of members interests - Legitimate expectation cannot go beyond basis of relationship laid down in Articles of Association - Petitioner must come with clean hands - Court of equity will not order winding-up where there is adequate alternative remedy available*

COMPANY LAW: *Members' rights - Contractual effect of Memorandum and Articles of Association - Provisions of Memorandum and Articles of Association constitute statutory contract between members - Claim for legitimate expectation to management said to exist outside Articles of Association unlikely to succeed*

The 2nd petitioner was the sole proprietor of a bakery shop known as "King's Confectionery". In 1991, this was changed into a partnership consisting of the 2nd petitioner and the 1st petitioner, the 2nd petitioner's husband as partners. In 1975, the 2nd petitioner, her two sisters and her mother formed a partnership to operate another bakery shop also known as "King's Confectionery". In 1981, the 2nd petitioner's mother and one of the 2nd petitioner's sisters withdrew from the partnership and the 2nd petitioner's other brothers and sister (the 2nd, 4th and 5th respondents) entered into the business taking over their shares. In 1993 the 2nd respondent and the 1st petitioner incorporated the 1st respondent as a private limited company under the Companies Act 1965 which took over the businesses of both the partnerships. The petitioners and respondents were shareholders and directors of the company. Later some

dispute arose between the petitioners and the 2nd - 5th respondents. As a result of the dispute, the respondents replaced the 2nd petitioner with the 5th respondent as Chairman of the company.

The petitioners presented the present petition to wind-up the 1st respondent company on a "just and equitable" ground under s. 218(1)(i) of the Companies Act 1965, *inter alia*, on the grounds that the affairs of the company were being conducted in disregard of the interests of the petitioners; the petitioners had been wrongfully excluded from the management of the company; and that there was a complete breakdown of mutual trust and confidence between the other shareholders/directors of the company. The petitioners also claimed that there was a legitimate expectation by the petitioners to have an equal share in the management of the company's business; that the petitioners had been removed as bank signatories for the company; that the petitioners were denied access to the company's records; that there were disagreements over the mode of conducting business, acquisition of assets and overseas investments; and that the company had employed new staff without the petitioners' agreement. The 1st respondent, on the other hand filed an application to strike out the petition pursuant to O. 18 r. 19(1)(b) or (d) of the Rules of the High Court 1980 and/or pursuant to the inherent jurisdiction of the court. The 2nd-5th respondents contended that the relationship amongst the company's shareholders was governed exhaustively by the Memorandum and Articles of Association; that the petitioners were the cause of the matters complained of; and that the differences in management policies are matters relating to business judgments which the courts do not interfere and do not attract the application of the just and equitable jurisdiction to wind-up the company.

Held (dismissing the petition with costs):

[1] The petitioners had the burden to prove the followings: (a) that the 1st respondent company was an "Ebrahimi" type of company or a quasi-partnership company; (b) that there was in existence a specific identifiable legitimate expectation that the petitioners were entitled to the alleged sharing of management control; and (c) that there had been a breach of this agreement or understanding relating to this legitimate expectation which according to established principles of equity was just and equitable to restrain. (p. 88 f-g)

[2] An "Ebrahimi" type of company is a "quasi-partnership" company having the following three elements, namely: (i) an association formed or continued on the basis of a personal relationship involving mutual confidence; (ii) an agreement or understanding that all or some of the shareholders shall participate in the conduct of the business; and (iii) restriction upon transfer

of the members interests so that if confidence is lost or one member is removed from management, he cannot take out his stake and go elsewhere. (pp. 88 h & 89 a)

[3] The courts will subject the exercise of legal rights to equitable considerations in given circumstances. The case for giving effect to equitable considerations must be made in each instance and it is not sufficient simply to assert that the company is small or private, for in many cases the basis of the relationship will be adequately and exhaustively laid down in the Articles of Association of the company. If it is so defined by the Articles of Association or supplemented by a shareholders' agreement, then there is little room for founding further legitimate expectation beyond those outlined in the documents. (p. 89 b-d)

[4] The provisions of the Memorandum and Articles of Association constitute the statutory contract between the members or shareholders of a company and must be given due regard. The petitioner cannot ignore it on a vague, unparticularised and unsubstantiated allegation of a legitimate expectation, a claim for legitimate expectation to management said to exist outside the Articles of Association is unlikely to succeed. (p. 94 c-d)

[5] The petitioners had failed to discharge the burden of proof of the existence of this collateral agreement on the alleged sharing of management control. Therefore, the question of 'legitimate expectation' did not arise at all. The petitioners also failed to prove that they had been excluded from participating in the management of the 1st respondent. Differences in domestic policies are not for the court to interfere and are not sufficient to wind-up the company under the just and equitable provisions. (pp. 97 a-b & 100 e)

[6] The petitioners' conduct was shown to be inequitable. The petitioners were therefore the cause of the difficulties themselves. "He who comes into equity must come with clean hands". It is established principle that the clean hands doctrine bars winding-up by a petitioner whether the company is an ordinary company or quasi-partnership. The petitioners did not come with clean hands in filing the petition. (pp. 102 e, f & 103 c)

[7] There was no actual deadlock in the management of the 1st respondent. There was no evidence to suggest that the 1st respondent had been unable to operate normally. A court of equity will not make an order for winding-up of a company where there is an adequate alternative remedy available. The fact that a company is solvent and can continue to carry out its business are factors which can be considered where there is an adequate alternative remedy and where there is no actual deadlock in management.

The petitioners' difficulties could be resolved by them disposing off their shares without the necessity of having to wind-up the company. The petitioners ought to have filed a petition under s. 181 of the Companies Act 1965. (pp. 104 g, 105 a & 106 b)

Case(s) referred to:

Beh Chun Chuan v. Paloh Medical Centre Sdn Bhd & Ors [1999] 7 CLJ Supp 1 HC ***(refd)***

Dato' Low Mong Hua v. Banting Hock Hin Estate Co Sdn Bhd & Ors [2003] 6 AMR 245 ***(refd)***

Ebrahimi v. Westbourne Galleries Ltd [1973] AC ***(refd)***

Fair View Schools Bhd v. Indrani Rajaratnam [1998] 1 CLJ 285 CA ***(refd)***

Grace v. Biagioli & Ors [2005] All ER 60 ***(refd)***

International Hospitality Concepts Pty Ltd. v. National Marketing Concepts Inc (No. 2) [1994] 13 ACSR 368 ***(refd)***

Kumagai Gumi Co Ltd. v. Zenecon-Kumagai Sdn Bhd [1994] 2 MLJ 789 ***(refd)***

Loh Siew Cheang v. Corporte Powers, Controls, Remedies and Decision-Making [1996] MLJ 152 ***(refd)***

O'veill v. Phillips [1999] 2 BCLC 1 ***(refd)***

Re a Company (No: 00314 of 1989) [1991] BCLC 154 ***(refd)***

Re Blue Arron Plc [1987] BCLC 585 ***(refd)***

Re Elgindata Ltd [1991] BCLC 959 ***(refd)***

Re Five Minute Car Wash Services Ltd [1966] 1 All ER 242 ***(refd)***

Re Guidezone Ltd [2000] 2 BCLC 321 ***(refd)***

Re John White Springs (S) Pte Ltd; Re Segno Precisson Pte Ltd [2001] 2 SLR 248 ***(refd)***

Re Martin Coulter Enterprises Ltd [1988] BCLC 12 ***(refd)***

Re Ringtower Holdings Plc [1989] 5 BCC 82 ***(refd)***

Tay Bok Choon v. Tahansan Sdn Bhd [1987] BCLC 472 ***(refd)***

Tuan Hj Ishak Ismail v. Leong Hup Holdings Bhd & Ors [1996] 1 CLJ 393 CA ***(refd)***

Vujnovid & Anor v. Vujnovich [1990] BCLC 227 ***(refd)***

Woodsville Sdn Bhd v. Tiensk Enterprises Sdn Bhd [1994] 3 MLJ 89 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 105, 167, 181, 210, 218(1)(i), 459

Rules of the High Court 1980, O. 18 r. 19(1)(b)(d)

Companies Act 1985 [UK], s. 459

Other source(s) referred to:

Farrar, *Company Law*, 3rd edn, 1991, pp. 464-465

For the petitioners - Leong Wai Heng (Claudia Cheah); M/s Skrine
For the 1st respondent - Benjamin Yean; M/s Benjamin Yean & Co
For the 2nd-5th respondents - William Leong; M/s William Leong & Co

Reported by Amutha Suppayah

JUDGMENT

Ramly Ali J:

The petitioners presented the present petition (dated 16 September 2005) to wind-up the 1st respondent company on a "just and equitable" ground under s. 218(1)(i) of the Companies Act 1965 on the following grounds, namely:

(a) the affairs of the company have been and are being conducted in disregard of the interests of the petitioners;

(b) the powers of the board of directors of the company are being exercised in disregard of or prejudicial to the interests of the petitioners;

(c) there is a lack of probity in the management of the company by the directors;

(d) the petitioners have been wrongfully excluded or alternatively, steps have been taken by the respondents to wrongfully exclude the petitioners from the management of the company; and

(e) there is now a complete breakdown of mutual trust and confidence in the management of the company and/or between the other shareholders/ directors of the company and the petitioners.

The 1st respondent, on the other hand filed an application (*vide* encl. 24) to strike out the petition pursuant to O. 18 r. 19(1)(b) or (d) of the Rules of the High Court 1980 and/or pursuant to the inherent jurisdiction of the court, on the following grounds, namely:

(a) the petition filed is scandalous, frivolous or vexatious and/or is otherwise a blatant abuse of the process of this court;

(b) the grounds of the petition relied on by the petitioners are based on alleged oppressive acts complained of against the respondents, giving rise only to an action for oppression by the petitioners;

(c) such alleged oppressive acts are predicated on events occurring substantially after the filing of the said petition;

(d) such alleged oppressive acts are in fact a course of action taken by the respondents to remedy the wrongful acts perpetrated by the petitioners against the respondents and the 1st respondent's property;

(e) the petition filed herein is in fact a retaliation by the petitioners designed to prevent or otherwise deflect the respondents from pursuing legal recourse for wrongs committed by the petitioners; and

(f) in all the circumstances, the petitioners have acted in grievous bad faith and seeks this court's assistance in these proceedings with unclean hands to benefit from their own wrongful acts.

Factual Background

On 1 April 1973, the 2nd petitioner was the registered sole proprietor of a bakery shop known as "King's Confectionery" with its principal place of business at No. 33, Jalan 60, Kepong Baru, Kuala Lumpur. The business registration is 299372. In 1991, this was changed into a partnership consisting of the 2nd petitioner and the 1st petitioner, the 2nd petitioner's husband as partners.

On 9 November 1975, the 2nd petitioner, the 3rd respondent, Madam Kau Kwee Yong and Madam Wong Kee formed a partnership to operate another bakery shop. It was also known as "King's Confectionery". Its principal place of business was at Lot 30, Batu 5, Jalan Besar, Ampang, Kuala Lumpur. The business registration is 392353. Madam Kau Kwee Yong is the 2nd petitioner's mother. Wong Kee and the 3rd respondent are the 2nd petitioner's sisters. On 5 October 1981, Madam Kau Kwee Yong withdrew from the partnership and the 2nd, 4th and 5th respondents, her sons and another daughter entered into the business. Later in the same year, the 2nd-5th respondents also took over Madam Wong Kee's shares. She thereafter also withdrew from the business.

On 18 January 1993 the 2nd respondent and the 1st petitioner incorporated the 1st respondent as a private limited company under the Companies Act 1965 under the name of "K's Confectionery Sdn. Bhd.". At the first board meeting on 20.8.1993, attended by the 2nd respondent and the 1st petitioner as the first directors, the certificate of incorporation was tabled and the memorandum and articles of association were adopted.

On 15 December 1993, the 2nd petitioner, the 3rd, 4th and 5th respondents were appointed as directors of the company.

On 15 December 1993, at the company's board meeting several resolutions were approved. The resolutions are as follows:

1. The petitioners and the 2nd-5th respondents were appointed to various positions in the board:

   (a) The 2nd petitioner - Chairman
   (b) The 2nd respondent - Managing Director
   (c) The 1st petitioner - Finance Director

(d) The 5th respondent - Finance Director

(e) The 3rd respondent - Executive Director (Accounts)

(f) The 4th respondent - Executive Director (Purchasing).

2. The petitioners and the 2nd-5th respondents were to be paid a monthly remuneration;

3. The new company "K's Confectionery Sdn. Bhd." is to take-over the business of the earlier King's Confectionery (ie, the business of the 1st King's Confectionery and the 2nd King's Confectionery);

4. The company is to rent the following premises:

(a) No. 3, Jalan 60, Kepong Baru, Kuala Lumpur (the 1st King's Confectionery premises); and

(b) No. 124, Jalan Mega Mendung, Komplek Bandar, 58000 Jalan Kelang Lama, Kuala Lumpur (the 2nd King's Confectionery premises).

5. The company is to acquire each of the petitioners and 2nd-5th respondents motor cars;

6. The company is to rent the premises at No. 44, Jalan 71, Kepong Baru for its workers' accommodation.

The company had an authorised capital of RM100,000. It was increased on 15 November 1995, 30 August 1996 and 14 December 2001. Its present authorised capital is RM5,000,000 and it paid-up capital is RM2,100,000. The shareholding are as follows:

Shareholder	No. of Shares	Percentage
(a) The 1st petitioner	525,000	25%
(b) The 2nd petitioner	525,000	25%
(c) The 2nd respondent	462,000	22%
(d) The 3rd respondent	168,000	8%
(e) The 4th respondent	168,000	8%
(f) The 5th respondent	252,000	12%
Total	2,100,000	100%

On 2 November 1998, the registrar of companies approved the company's change of name from "K's Confectionery Sdn. Bhd." to "King's Confectionery Sdn. Bhd.".

Since its incorporation and taking over of the 1st King's Confectionery and 2nd King's Confectionery's business, he company has enjoyed a steady growth in business and profits. It presently operates 50 outlets and shops and has more than 800 employees. The company's audited gross revenues for 2003 was more than RM41 million.

The 1st petitioner had on 10 November 1995 registered trademarks under application numbers: 95/011960, 95/11961. 95/011962, 95/011963 and 95/02264 in Class 30.

The trademarks are King's Confectionery trademarks that the company was and are continuing to use in its business.

The 1st petitioner executed a deed of assignment dated 28 January 2005 to assign the trademarks to the company. The company's secretary, Kuan Yok Teng prepared the deed of assignment. The 1st petitioner also signed the application and declaration of assignment to the company dated 28 January 2005. The application is to assign the trademarks to the company without goodwill.

The 2nd respondent later instructed the solicitors to conduct a search on the Trademarks and was informed that the application made by the 1st petitioner to the registry of trademarks was to assign the trademarks to the company "without goodwill".

At the company's board of directors meeting on 13 July 2005:

1. the petitioners requested for additional directors to be appointed. The respondents voted against and the petitioners in favour of the proposal. The proposal was not approved;

2. a proposal to cancel the appointment of the petitioners' sons as associate directors and re-designate them as factory manager and reform manager was approved. The respondents voted for and the petitioners against the proposal;

3. the 2nd respondent proposed that the company look into a local and international franchise programme due to the markets slowing down to reduce the company's investment risks. The proposal was approved. The respondents voted for the proposal and the petitioners against;

4. a proposal to replace the 2nd petitioner with the 5th respondent as Chairman was approved. The 2nd-5th respondents voted for and the petitioners against the proposal; and

5. a proposal to replace the company secretary was approved. The 2nd-5th respondents voted for and the petitioners against the proposal.

The 5th respondent then issued a memorandum that directors are to submit a written request for the company's information and to acknowledge receipt of such documents. It also stated that directors' claims and reimbursable expenses are to be forwarded to the chairman's or managing director's office for approval.

By a letter dated 20 July 2005 written to the 1st petitioner, the 2nd respondent as the company's managing director, expressed shock and surprise to discover that the application for the assignment of the Trademarks to the company was "without goodwill". The 2nd respondent stated in the letter that the trademarks belonged to the company and asked the 1st petitioner to immediately transfer the trademarks to the company without reservation.

The petitioners through their solicitors replied in a letter dated 2 August 2005 that:

1. The 1st petitioner is the rightful owner of the trademarks;
2. the 1st petitioner signed the deed of assignment involuntarily under duress and that he did not know the true meaning and purport of the document he executed because it was not explained to him;
3. the deed of assignment was voidable, invalid and unenforceable;
4. the 1st petitioner would be taking steps to retain ownership and rights to the trademarks.

The petitioners' solicitors sent a second letter also dated 2 August 2005 setting out the petitioners' grievances. The letter states that the affairs of the company and the power of the board were being conducted in disregard of the petitioners' interest; that there was a lack of probity; that the petitioners have been excluded from management and that there has been a complete breakdown of mutual trust and confidence. The letter did not provide any details of the allegations. However, notwithstanding this lack of details, the solicitors gave notice that a petition would be filed to wind-up the company on just and equitable ground.

The petitioners through their solicitors demanded in a letter dated 11 August 2005, that the company obtain the release and discharge of various properties provided to RHB Bank as security for the company's banking facilities within five days.

The petitioners through their solicitors in a letter dated 16 August 2005, terminated the tenancy of one of the company's business premises and demanded for delivery of vacant possession.

At the board meeting held on 5 August 2005, the petitioners as directors objected to the company's solicitors attending the meeting to advise the board on the legal issues relating to the trademark matter. The petitioners also voted against the proposal for the company to sue the 1st petitioner for his refusal to transfer the trademarks.

The petitioners refused to sign the cheques for payment to the company's solicitors to commence the trademark suit. The 2nd respondent in his letter dated 15 August 2005 informed the petitioners that if they did not sign the cheques, it would be necessary to change the bank signatories. The 1st petitioner in his letter of 18 August 2005, refused to sign and said that this was an excuse to remove the petitioners as bank signatories.

Following the petitioners' refusal to sign the cheques for payment to the company's solicitors for the trademarks suit, the 2nd-5th respondents approved a resolution to change the bank signatories. The resolutions provided that cheques are required to be signed by either one of the petitioners and countersigned by any one of the 2nd-5th respondents. For cheques not exceeding RM100,000, any two of the 2nd-5th respondents may sign.

The company filed the Kuala Lumpur High Court Civil Suit No. D7-22-1225-2005 ("the trademark suit") on 8 August 2005. The company named the petitioners and the former company secretary, Kuan Yok Teng as defendants claiming among others, a declaration that the company is the beneficial owner of the trademarks and for an injunction to require the 1st petitioner to transfer the trademarks to the company and damages. The petitioners filed a defence and counterclaim. The petitioners averred that the original King's Confectionery logo was first used by the 1st King's Confectionery and that variations to that logo were only used after the company's incorporation and by reason thereof the petitioners are the owners of the Trademarks as proprietors of the 1st King's Confectionery. The petitioners averred that the deed of assignment was void because the 1st petitioner signed under duress and that he did not understand the meaning of the contents because it was not explained to him. The petitioners in their counterclaim seek among others, a declaration that the petitioners are the owners of the trademarks; a declaration that the deed of assignment is void; a declaration that the company and the 2nd-5th respondents are liable to account to the petitioners for royalties and profits derived from the use of the Trademarks, and damages. The court granted an ad interim injunction restraining the petitioners from dealing with the trademarks on 23 August 2005.

The Petition

The petitioners filed this petition on 16 September 2005

In the petition, the petitioners' complaint may be summarised as follows:

1. that there is a legitimate expectation by the petitioners to have an equal share in the management of the company's business;
2. that the petitioners have been excluded from the management of the company's business;
3. that the petitioners have been removed as bank signatories;
4. that the petitioners have been denied access to the company's records;
5. that there are disagreements over the mode of conducting business, acquisition of assets and overseas investments; and
6. that the company has employed new staff without the petitioners' agreement.

The Respondents' Contentions

The 2nd-5th respondents oppose the petition on the following grounds:

1. The relationship amongst the company's shareholders is governed exhaustively by the memorandum and articles of association. The complains relate to actions taken in accordance with the articles of association and in the best interest of the company;
2. the petitioners are the cause of the matters complained of; and
3. that the differences in management policies are matters relating to business judgments which the courts do not interfere and do not attract the application of the just and equitable jurisdiction to wind-up the company.

Findings Of The Court

The court shall now deal with the complaints made by the petitioners in supporting their Petition to wind-up the 1st respondent.

Legitimate Expectation

The petitioners argued that they had a legitimate expectation of an understanding or arrangement between the shareholders/directors of the 1st respondent and such understanding or arrangement had been breached and it was no longer possible for them to continue being a part of the 1st respondent, therefore it would be "just and equitable" for the 1st respondent to be wound-up. The petitioners' basis for seeking the winding-up of the 1st respondent is that the incorporation of the 1st respondent was promoted on the understanding or arrangement that there would equal ownership and management; that there was trust and confidence; that such understanding or arrangement would not

change. If there was change in this regard, then the petitioners' legitimate expectation of such understanding or arrangement would be breached and it would be "just and equitable" for the 1st respondent to be wound-up. Numerous affidavits have been filed by the petitioners to attempt to demonstrate that there was such an understanding or arrangement and he conclusion reached by the petitioners was that under the present circumstances, they could not be expected to continue to participate in the 1st respondent as shareholders and they ought to be entitled their shares in liquidations.

The petitioners' gravamen is in para. 6 of the petition which is reproduced below:

> The intention of Your petitioners and Group B was that each party should have an equal share in the management of the business. Therefore, the shares in the Company were accordingly allotted equally to Your petitioners (50%) and to Group B (50%). Further, the articles of association have at all material times provided and still provide that at general meetings, each shareholder should on a show of hands have one vote and on a poll one vote for each share held by him. In terms of operation of the business, it was also intended that the parties have an equal control in that the 2nd petitioner would act as the Chairman while the respondent would act as the Managing Director.

The petitioners counsel submitted that it could not have been the intention of the petitioners when they set up the 1st respondent company that they would not have control and management of the company.

The court is of the view that it is not sufficient for the petitioners to allege a mere intention in order to discharge their evidential burden. The petitioners have the burden to prove the followings:

(1) that the 1st respondent company is an "Ebrahimi" type of company or a quasi-partnership company;

(2) that there is in existence a specific identifiable legitimate expectation that the petitioners are entitled to the alleged sharing of management control; and

(3) that there has been a breach of this agreement or understanding relating to this legitimate expectation which according to established principles of equity, the court finds it just and equitable to restrain.

An "Ebrahimi" type of company is a "quasi-partnership" company having the following three elements, namely:

(i) an association formed or continued on the basis of a personal relationship involving mutual confidence;

(ii) an agreement or understanding that all or some of the shareholders shall participate in the conduct of the business; and

(iii) restriction upon transfer of the members interests so that if confidence is lost or one member is removed from management, he cannot take out his stake and go elsewhere.

(see: The decision of Lord Wilberforce in *Ebrahimi v. Westbourne Galleries Ltd.* [1973] AC 360 at 370).

It is an established principle of law that the courts will subject the exercise of legal rights to equitable considerations in given circumstances. There is no universal formula to determine the circumstances under which the courts will do so. Lord Wilberforce in *Ebrahimi's* case, provided an illustrations as to the circumstances whereby the courts will do so. The case for giving effect to equitable considerations must be made in each instance and it is not sufficient simply to assert that the company is small or private, for in many cases the basis of the relationship will be adequately and exhaustively laid down in the Articles of Association of the company. If it is so defined by the Articles of Association or supplemented by a shareholders' agreement, then there is little room for founding further legitimate expectation beyond those outlined in the documents, (see also: *Company Law* by Farrar, 3rd edn. 1991 at pp. 464-465).

Ebrahimi's case has been followed and applied in Malaysia in *Tay Bok Choon v. Tahansan Sdn. Bhd.* [1987] BCLC 472; *Woodsville Sdn. Bhd. v. Tiensk Enterprises Sdn. Bhd.* [1994] 3 MLJ 89; *Tuan Haji Ishak bin Ismail v. Leong Hup Holdings Bhd. & Ors* [1996] 1 CLJ 393.

The illustrations given by Lord Wilberforce in *Ebrahimi's* case was not intended to be exhaustive and that each case must be decided according to its own facts and of importance is the essence of the relationship between the parties concerned.

After the *Ebrahimi*'s case, it has became fashionable to use the phrase "legitimate expectation" when dealing with the rights of shareholders in quasi-partnership companies. The House of Lords in *O'veill v. Phillips* [1999] 2 BCLC 1 warned against developing the phrase "legitimate expectation" which was borrowed from public law to be employed in circumstances beyond the dimensions contemplated in the *Ebrahimi*'s case.

At p. 7 of *O'veill's* case, Lord Hoffman said as follows:

> In the case of s 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association

are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus, the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman Socientas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification been carried over in the company law.

The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity will regard as contrary to good faith.

This approach to the concept of unfairness in s. 459 runs parallel to that Lordships' House in *Ebrahimi v. Westbourne Galleries Ltd*. [1972] 2 EAR 492, [1973] AC 360, adopted in giving content to the concept of "just and equitable" as a ground for winding-up. After referring to cases on the equitable jurisdiction to require partners to exercise their powers in good faith, Lord Wilberforce said [1972] 2 EAR 492 at 500, [1973] AC 330 at 379:

> The words ("just and equitable") are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company's structure. That structure is defined by the Companies Act 1948 and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definitions sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, the respondents (the company) suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the Court to dispense him from it. It does, as equity always does, endeavour the Court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

At p. 8, Lord Hoffman continued and said:

> In my view, a balance has to be struck between the bredth of the discretion given to the Court and the principle of legal certainty. Petitions under s. 459 are often lengthy and expensive. It is highly desirable that lawyers should be able to advise their clients whether or not a petition is likely to succeed. Lord Wilberforce, after the passage which I have quoted, said that it would be impossible and "an wholly undesirable" to define the circumstances in which the application of equitable principles might make it unjust, or inequitable (or unfair) for a party to insist on legal rights or to exercise them in a particular way. This of course is right. But that does not mean that there are no principles by which those circumstances may be identified. The way in which such equitable principles operate is tolerably well settled and in my view, it would be wrong to abandon them in favour of some wholly indefinite notion of fairness.

On the phrase "legitimate expectation" Lord Hoffman, at p. 11, said:

> It was probably a mistake to use this term, as I usually is when one introduces a new label to describe a concept which is already sufficiently defined in other terms. In saying that it was "correlative" to the equitable restraint, I meant that it could exist only when equitable principles of the kind I have been describing would make it unfair for a party to exercise rights under the articles. It is a consequence, not a course of the equitable restraint. The concept of legitimate expectation should not be allowed to lead a life of its own, capable of giving rise to equitable restraints in circumstances to which the traditional equitable principles have no application.

In that case (*O'veill's* case), the House of Lords held that the petitioner's claim that he had a legitimate expectation to be given more shares when he achieved certain targets was dismissed on the basis that there was no promises made and there was no basis consistent with principles of equity for a court to hold that the director had behaved unfairly.

The Court of Appeal in the recent case of *Grace v. Biagioli and others* [2005] All ER 60 said that the following principles can be deduced from Lord Hoffmann's speech in *O'Neill v. Phillips*:

(1) The concept of unfairness although objective in its focus is not to be considered in a vacuum. An assessment that conduct is unfair has to be made against the legal background of the corporate structure under consideration. His will usually take the form of the articles of association and any collateral agreements between shareholders which identified their rights and obligations as members of the company. Both are subject to establish equitable principles which may moderate the exercise of strict legal rights when insistence on the enforcement of such rights would be unconscionable.

(2) If follows that it will not ordinarily be unfair for the affairs of a company to be conducted in accordance with the provisions of its articles or any other relevant and legally enforceable agreement, unless it would be inequitable for those agreements to be enforced in the particular circumstances under consideration. Unfairness may, to use Lord Hoffmann's words, "consists in the breach of the rules or in using rules in a manner which equity would regard as contrary to good faith". The conduct need not therefore be unlawful, but it must be inequitable.

(3) Although it is impossible to provide an exhaustive definition of the circumstances in which the application of equitable principles would render it unjust for a party to insist on his strict legal rights, those principles are to be applied according to settled and established equitable rules and not by reference to some indefinite notion of fairness;

(4) To be unfair, the conduct complained of need not be such as would have justified the making of a winding-up order on just and equitable grounds as formerly required under s. 210 of the Companies Act, 1948.

(5) A "useful test" is always to ask whether the exercise of the power or rights in question would involve a breach of an agreement or understanding between the parties which it would be unfair to allow a member to ignore. Such agreement do not have to be contractually binding in order to found the equity;

(6) It is not enough merely to show that the relationship between the parties has irretrievably broken down. There is no right of unilateral withdrawal for a shareholder when trust and confidence between shareholders no longer exist. It is, however, different if that breakdown in relations, then causes the majority to exclude the petitioner from the management of the company or otherwise to cause him prejudice in his capacity as a shareholder.

Applying the "useful test" referred to by Justice Patten in *Grace's* case to the facts of the present case, the petitioners in the present case have failed to prove the followings essential ingredients:

1. That there is an agreement or understanding between the parties that is beyond the articles of association;

2. That there is a breach of this agreement or understanding based on established equitable principles and not some indefinite notion of fairness; and

3. That it is not enough merely to show that the relationships between the parties have irretrievably broken down. It has to be shown that the majority has excluded the petitioners from the management of the company or otherwise to cause him prejudices in his capacity as a shareholder.

It is to be noted that the petitioners, in the present case alleged "an intention" in para. 6 of the petition. The petitioners had failed to aver that there is an agreement or understanding between the parties with regards to the alleged sharing of management control of the 1st respondent. The petitioners have not shown by whom and how the agreement or understanding was made with each of the 2nd-5th respondents. Since to restrain each of the 2nd-5th respondents, it is incumbent on the petitioners to show that each of them has made such an agreement with the petitioners. In the absence of such an agreement, it would be unfair to restrain any of the 2nd-5th respondents, who did not enter into such an agreement or undertaking with the petitioners. Without such an agreement, the question of "breach" does not arise at all. In the circumstances, an unilateral intention unannounced by the petitioner is not sufficient. The petitioner must prove the existence of such an alleged underlying understanding is common to all shareholders, (see: *Re Ringtower Holdings Plc* [1989] 5 BCC 82; *Tuan Haji Ishak bin Ismail v. Leong Hup Holdings Bhd.* [1996] 1 CLJ 393; *Re Blue Arron Plc* [1987] BCLC 585). It must be shown that the understandings or intentions are common to all the shareholders and is not the result of a private bargain between one but not all the shareholders, (see also: *Loh Siew Cheang v. Corporte Powers, Controls, Remedies and Decision-Making* [1996] MLJ 152).

The petitioners have failed to provide any credible evidence as to the parties, dates, venue and form of the agreement or understanding that they are alleging that they will be entitled to share equally the management control between the petitioners on one part and the 2nd-5th respondents on the other part on a 50:50 basis.

There is no reference to any collateral agreement or understanding for the alleged sharing of management control in the 1st directors meeting held on 20 August 1993, immediately after the 1st respondent was incorporated. The said meeting adopted the Memorandum and Articles of Association without qualification. There is also no provision in the Articles of Association referring to the alleged sharing of management control. Such an agreement or understanding must be incorporated in the form of a separate collateral agreement between all the shareholders or alternatively, must be provided for in the Articles of Association. This has been stressed by Lord Wilberforce in *Ebrahimi's* case as follows:

> If it is so defined by the articles or for example, by the articles supplemented by a shareholders' agreement, then there is little room for finding further legitimate expectations beyond those outlined in the documents.

The importance of the Memorandum and Articles of Association have been emphasized by the Court of Appeal in Tuan Haji Ishak bin Ismail's case and *Fair View Schools Bhd. v. Indrani a/p Rajaratnam* [1998] 1 CLJ 285 CA In *Tuan Haji Ishak bin Ismail's* case, Mahander Shanker JCA held at p. 421, that:

> ... if they regarded these matters as important, we think it was imperative not only that agreements on such matters should have been put into writing but also the articles of association should have been amended so as to substantiate the claim that is being made.

The provisions of the memorandum and articles of association constitute the statutory contract between the members or shareholders of a company and must be given due regard. The petitioner cannot ignore it on a vague, unparticularised and unsubstantiated allegation of a legitimate expectation, (see: *Dato' Low Mong Hua v. Banting Hock Hin Estate Co. Sdn. Bhd. & Ors* [2003] 6 AMR 245). A claim for legitimate expectation to management said to exists outside the Articles of Association is unlikely to succeed. (see: *Beh Chun Chuan v. Paloh Medical Centre Sdn. Bhd. & Ors* [1999] 7 CLJ Supp 1). A company is an association of persons for economic purpose, usually entered into with legal advice and some degree of formality. The terms of the associations are contained in the articles of association and sometime in collateral agreements between the shareholder. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed, (per Lord Haffman in *O'Neill's* case).

There is no reference of the alleged sharing of management control or any evidence of a collateral agreement or understanding in the minutes of the board meeting held on 15 December 1993 on the approval by the directors to takeover the business of the 1st King's Confectionery and 2nd King's Confectionery.

There is also no reference to the alleged sharing of management control in the minutes of 13 July 2005 board meeting when the proposals for the appointment of additional directors were not approved or when the petitioners sons' appointment as associate directors were cancelled. It would be normal in the ordinary course of human nature for the petitioners to have referred to this collateral agreement if this existed, during the discussions. This omission shows that the allegation is an afterthought.

At the 15 December 1993 board meeting, six directors were appointed, namely, the two petitioners and the 4 2nd-5th respondents. If there were such an alleged sharing of management control as alleged by the petitioners, there would have been an equal number of directors from both factions. The fact that the 4 2nd-5th respondents were appointed and thereby forming a majority shows that it is inherently improbable that such a collateral agreement was made by the parties.

The 2nd-5th respondents contend that the 50-50 shareholding was issued based on the agreed value of the respective 1st King's Confectionery and 2nd King's Confectionery. This contention is more credible upon consideration of the entire background and factual matrix in particular the minutes of the 15/12 board meeting.

The appointment of the 2nd petitioner as chairman does not in any way prove the existence of this collateral agreement. Article 80 of the Articles of Association provides that questions at meetings of directors are to be decided by a majority of votes and the determination by the majority of directors. The chairman shall only have a second or casting vote in the case of an equality of votes. Since from inception, the 2nd-5th respondents hold a majority in number on the board, there will be no situation whereby the chairman would have a second or casting vote. It does not accord with business sense or common sense for the petitioners, if such an collateral agreement subsisted, to have only 2 directors and the 2nd-5th respondents 4. It would normally be a board of 4:4 or 3:3 if the allegation is true. Further, if such collateral agreement on the alleged sharing of management control existed, the normal practice is to have joint managing directors. The board appointments on 15 December 1993 therefore show that there is no such collateral agreement for the alleged sharing of management control. This allegation is inherently improbable when reviewed against the comtemporaneous documentary evidence. In the circumstances, the allegation that the 2nd petitioner's appointment as Chairman is evidenced of the collateral agreement or of the existence of the alleged sharing of management control is without merits.

The 2nd-5th respondents have shown evidence that the chairman's position is not the sole domain of the 2nd petitioner. They have been instances from time to time where the 2nd-5th respondents have taken the chairman's position. There were no objections then.

The 2nd-5th respondents have produced evidence that from inception they have agreed and it was the understanding that the relationship amongst the shareholders would be exhaustively governed by the articles of association. They have produced the following evidence:

(a) The parties have taken the trouble and effort to incorporate a company under the Companies Act, 1965 and to comply with the formalities of adopting the memorandum and articles of association. If there was such an agreement as alleged, the parties would have continued as a partnership by merging the two businesses instead of proceeding to incorporate a company with all its attendant formalities and requirements;

(b) these formalities and requirements, in particular, the difficulty of obtaining the Registrar of Companies' approval to use the name "King's Confectionery" shows that the parties agreed to proceed as a corporation and not as an extension of a partnership business;

(c) the 1st King's Confectionery and the 2nd King's Confectionery were separate and distinct businesses. This is therefore not a case of a family business evolving into a corporate entity while retaining its partnership characteristic. It was a merger of the two businesses by way of corporatisation;

(d) the respondents have shown that one of the purposes for the corporatisation is to obtain a listing in the stock exchange. By reason thereof, the agreement and understanding is that the memorandum and articles of association shall be exhaustive. The evidence of the objective to list a company are set out in the various contemporaneous evidence such as:

- Star 1 December 1997 article.
- Nanyang Siang Pau 20 October 2000 article, p. 9.
- Advice from the accountants on th equantitative, qualitative and other requirements for listing.
- Implementation of ISO 9001:2000 and Food Safety System (HACCP System Implementation).
- The job description for the general manager to prepare the company for the submission of the initial public offer (IPO) in exh. "R-8B(i)", p. 158).

The directors and shareholders have conducted the affairs of the company since its incorporation in 1993 in compliance with the Companies Act and the articles as shown by the audited accounts and annual returns and filings with the Registrar of Companies (now Companies Commission of Malaysia).

For the reasons given above, the petitioners have failed to discharge the burden of proof of the existence of this collateral agreement on the alleged sharing of management control. Therefore, the question of 'legitimate expectation' as claimed by the petitioners does not arise at all.

Exclusion From Management Of The Company's Business

The petitioners have failed to prove that they have been excluded from participating in the management of the 1st respondent company.

The petitioners participated in the deliberations at 5 August 2005 and 25 August 2005 board meetings respectively and other board meetings after 13 July 2005 and continue to do so:

(a) they participated and voted against the proposal for the company to commence the Trademarks Suit although they were interested parties being the defendants therein;

(b) cheques were sent to them for signature although they refused to sign the cheque to pay the solicitors;

(c) the conditions for signing of cheques and change in bank signatories provides for the petitioners to be one of the signatories;

(d) they have requested in their capacity as directors for inspection of the company's accounts and the 2nd-5th respondents have consented to the order for them to do so;

(f) they have requested in their capacity as directors for the adjournments of board meetings which the 2nd-5th respondents have agreed.

By reason of the matters aforesaid, the allegations that the petitioners have been excluded from management are wholly without substance. They have been and continue to attend and participate in board meetings. They have not been removed and they continue to enjoy the remunerations and benefits of service directors.

Removal As Bank Signatories

The petitioners complained that they had been removed as bank signatories. The court is of the view that this complaint is without merit. It was caused by the petitioners' own conduct in refusing to sign cheques to pay for the trademarks suit undertaken by the 1st respondent. The 2nd-5th respondents as majority directors of the company are entitled under the articles of association to change the bank signatories when need be. The 2nd-5th respondents are acting in the interest of the company, to commence the trademarks suit and to make proper payments for that purpose. From the facts

of the case, the 2nd-5th respondents were acting properly and in good faith for the best interest of the company. In doing so they have retained the right of the petitioners to sign for cheques exceeding RM100,000. By reason of the above the petitioners are not entitled to ask for the court's just and equitable remedy since they have not come with clean hands being the cause of the problems.

Access To The Company's Records

The petitioners also complained that they were denied access to the company's records by the 2nd-5th respondents. The 2nd-5th respondents have produced evidence to show that there are financial discrepancies within the company. The 2nd respondent had written a letter dated 16 September 2005 to the 1st petitioner for an explanation. The 1st petitioner has refused to provide an answer and instead have made various accusations. The vouchers showing the payments taken by the 1st petitioner had been produced and the correspondence relating to the financial irregularities are also produced. Clearly, the 1st respondent company is entitled to obtain clarification from the 1st petitioner, under such circumstances. The 2nd-5th respondents as directors are justified to take action upon the 1st petitioner's refusal to do so. By reason of the facts stated above, the 2nd-5th respondents are entitled to control the access by the 1st petitioner to the company's information and records.

In any event, with the consent order for the inspection of documents as requested by the petitioners under s. 167 of the Companies Act 1965, there should be no further cause for complaint by the petitioners on this same matter.

Disagreement On Business, Acquisition Of Assets And Overseas Investments

The petitioners have made allegations towards the viability of certain managerial decisions carried out by the 2nd-5th respondents particularly in respect of the followings:

(i) disagreements over the acquisition of assets by the 1st respondent company in respect of lands in Country Heights, Damansara and building at Kelana Jaya; and

(ii) overseas investments in China, Bangladesh and franchise agreement with Bangladesh company.

After going through the whole evidence, the court is satisfied that the petitioners allegations are baseless and without merits. There are evidence to show that the petitioners had, at all material times been consulted and they agreed to the relevant investments carried out by the company.

In respect of the land purchased by the company in Country Heights, Damansara, the petitioners were at all material times aware of the dividends that were being declared and utilized towards the payment of the said lands. The petitioners had not earlier complained of the purchase of the said lands, which were purchase for the benefit of the directors of the company including the petitioners. They had at all times enjoyed the benefits that were associated with the purchase of the lands and their complaint now is a complete turnaround. It is a mere attempt to turnish the managerial ability of the 2nd-5th respondents.

The company's purchase of the Kelana Jaya land was made with the agreement and approval of the petitioners. There was a board resolution to that affect (where the petitioners were parties). It is surprising now for the petitioners to complain about the decision that was made with their agreement and approval.

The company's investment in China and Bangladesh were made with consultations to the board as a whole. The petitioners were aware of the operations to be carried out in both these countries by visiting China and Bangladesh to ascertain the viability of the business there. The petitioners were very much involved in entering these two overseas ventures. They had pertinent knowledge of what they entailed and at the relevant times took active parts in the assessment and formulation of such ventures. These complaints do not show a lack of probity. If indeed there was any suggestion of wrongdoings at all in carrying pout these investments, the petitioners are equally culpable.

In *Re Five Minute Car Wash Services Ltd.* [1966] 1 All ER 242 (at p. 246), Buckley J. said that unwise, inefficient and careless management does no constitute oppressive conduct. The mere fact that a member of a company has lost confidence in the manner in which the company's affairs are conducted does not lead to the conclusion that he is oppressed; nor can resentment at being out voted; nor mere dissatisfaction with or disapproval of the conduct of the company's affairs whether on grounds relating to policy or to efficiency however well founded amounts to oppression if there is no unfair prejudice, (see: *Re Elgindata Ltd.* [1991] BCLC 959 (at p. 993).

The facts show that the petitioners agreed to all those investments and as to the various acquisitions. It is only after the Trademarks Suit had arisen the petitioners appear to have a change of heart. By this time the investments and acquisitions had been undertaken. This cannot be evidence of a lack of probity or oppression as claimed by the petitioners. These managerial decisions by themselves, cannot amount to unfair prejudice to the petitioners. In this

regards, Warner J. in the case of *Re Elgindata Ltd*. (*supra*) (at p. 993-994) in considering whether mismanagement is capable of constituting unfairly prejudicial conduct, stated as follows:

> Two considerations seem to me relevant. First there will be cases where there is disagreement between the petitioners and the respondents as to whether a particular managerial decision was, as a matter of commercial judgment, the right one to make, or as to whether a particular proposal relating to the conduct of the company's business commercially sound ... In my view, it is not for the Court to resolve such disagreements on a petition under s. 459. Not only is a judge ill-qualified to do so, but there can be no unfairness to the petitioners in those in control of the company's taking a different view from theirs on such matters.
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> Secondly, ... a shareholder acquires shares in a company knowing that their value will depend in some measure on the competence of the management. He takes the risk that that management may prove not to be of the highest quality. Short of a breach by a director of this duty of skill and care there is prima facie no unfairness to a shareholder in the quality of the management turning out to be poor.

The court is satisfied that not only are the managerial decisions complained of by the petitioners, taken with their full consultation and approval, but these are commercial decisions taken by a majority of the board of directors, without any breach of their duties of skill and care. Obviously these differences in domestic policies are not for the court to interfere and are not sufficient to wind-up the company under the just and equitable provisions.

Employment Of New Staff. Removal Of Company's Secretary; And Mode Of Conducting Business

The petitioners also made various other minor complaints relating to employment of new staff without their approval; removal of company's secretary and mode of conducting business in setting up and operating unprofitable outlets and kiosks. The court finds no real merits on these complaints. They are purely domestic managerial decisions undertaken by the majority of the board of directors in their day-to-day management of the 1st respondent company, for the best interest of the company's operation and business. There is no element of oppression or other wrongful conducts on the part of the 2nd-5th respondents shown by the petitioners. The mode of conducting business in setting up and operating of outlets and kiosks in purely a commercial decision to promote the 1st respondent's business. It is not for this court to interfere in such decisions. These complaints are not sufficient to wind-up the company under the just and equitable provisions.

The Trademarks Suit

The petitioners alleged animiosity among the parties. Upon a review of the evidence, the court is satisfied that the disputes relate to the issue of trademarks. The 2nd-5th respondents have required the 1st petitioner to transfer the trademarks to the 1st respondent since 1998 when the company's name was changed to King's Confectionery. The 13 July 2005 meeting followed the discovery that the 1st petitioner had retained the goodwill to the trademarks and only made a bare assignment. The ensuring exchange of correspondences and the filing of the present Petition by the petitioners were made when the 2nd-5th respondents took steps to cause the 1st respondent to sue the 1st petitioner for the trademarks.

The following facts, in relation to the trademarks, are not disputed:

1. That the 1st respondent after having acquired the business of the 1st King's Confectionery and the 2nd King's Confectionery in 1993, used the trademarks;

2. That since the business had been acquired by 1st respondent, there is no reason or benefit for so long as the 1st respondent carries on the business, for the trademarks to be used by the 1st King's Confectionery;

3. The 1st respondent has promoted the trademarks and has incurred substantial expenditure in doing so. The 1st respondent has invited Ministers to launch the logos, subscribed to magazines and periodicals. The total expenditure incurred for the last 10 years is about RM4.3 million.

4. The 1st respondent paid for the expenses to register the trademarks in the name of the 1st petitioner; and

5. The 1st petitioner signed the deed of assignment (whether it is voluntarily or otherwise).

The issue here is whether the 2nd-5th respondents as directors of the 1st respondent are acting in the interest of the 1st respondent to commence the trademarks suit against the petitioners. The evidence clearly show that the 2nd-5th respondents were acting properly, honestly and in good faith. The cause for the trademarks suit is the 1st petitioner's refusal to transfer the trademarks with goodwill to the 1st respondent. The petitioners' conduct is shown to be inequitable in this issue. They have objected to the 1st respondent obtaining legal advise on the trademarks suit. They have refused to sign cheques for payment for the legal advice and have generally taken actions to hinder the

trademarks suit. The proper conduct for the petitioners in such situations was to have abstained from all deliberations and proceedings relating to the trademarks suit as they are interested parties. The petitioners are therefore the cause of the difficulties themselves.

It is inherently improbable for the parties to have agreed to incorporate the 1st respondent to take over the two business to have reserved the beneficial ownership of the trademarks to the petitioners. The business was operated by the 1st respondent after 1993, there is no agreement that the petitioners are to continue the business of the 1st King's Confectionery.

The 2nd-5th respondents' contention that the 1st petitioner registered the trademark on behalf of the 1st respondent and held them in trust pending the change of name is more credible. This is confirmed by the 1st petitioner signing the deed of assignment. The plea of non est factum by the 1st petitioner is not acceptable. A review of the 1st petitioner's letters exhibited in these proceedings shows that he is literate, educated and a knowledgeable businessman. The plea of *non est factum* as raised by the 1st petitioner is clearly an "afterthought", and should not be accepted by the court.

The petitioners' conduct is inequitable. Since 1995, the petitioners have kept quiet and allowed the 2nd-5th respondents and the 1st respondents to expend time, effort and substantial sums of money of about RM4.3 million to advertise and promote the trademarks and it's goodwill. This was done on the belief that the 1st respondent is the beneficial owner of the trademarks. Having allowed this to be done, the petitioners are estopped from denying the 1st respondent's beneficial ownership. The petitioner's refusal to transfer the trademarks after the 1st respondent obtained approval to change its name is the sole cause of the difficulties. They are their own authors of the problems.

"Clean Hands Doctrine"

"He who comes into equity must come with clean hands". It is established principle that the clean hands doctrine bars winding-up by a petitioner whether the company is an ordinary company or quasi-partnership.

In *Kumagai Gumi Co. Ltd. v. Zenecon-Kumagai Sdn. Bhd.* [1994] 2 MLJ 789 (at p. 817) Anuar J. held:

> In my judgment, whether a winding-up order should be made is a matter within the discretion of the Court. In Ebrahimi, Lord Cross said (at p. 387 of the report):
>
> > A petitioner who relies on the 'just and equitable' clause must come to Court with clean hands, and if the breakdown in confidence between him and the other parties to the dispute appears to have been due to his misconduct he cannot insist on the company being wound up if they wish it to continues.

(see also: *Re John White Springs (S) Pte. Ltd; Re Segno Precisson Pte. Ltd*. [2001] 2 SLR 248; *Vujnovid & Anor v. Vujnovich* [1990] BCLC 227).

The complaint for the change of bank signatories is caused by the petitioners' own conduct themselves in refusing to sign the cheques to pay the solicitors for the trademarks suit. The 2nd-5th respondents as directors of the 1st respondent are entitled to change the bank signatories. In doing so, they have retained the right of the petitioners to sign for cheques exceeding RM100,000. By reason of the above, the petitioners are not entitled to ask for the aid of the court's just and equitable relief since they have not come with clean hands, being the cause of the problems. In *Kumagai Gumi*'s case the court dismissed the application or winding-up of a company with costs on the ground that the basis on which the petition has been presented is material occasioned by the petitioner's own misconduct. In the present case, the following evidence support the court's findings that the petitioners did not come with clean hands in filing the petition:

(a) the petitioners took advantage of the trust reposed on them to hold the trademarks on behalf of the 1st respondent and not only failed to return them but also held the 1st respondent to ransom in wrongfully claiming ownership of the said trademarks;

(b) there was strong evidence that the petitioners conspired with the former company secretary of the 1st respondent to usurp the said trademarks in that they purported to effect an assignment of the said trademarks to the 1st respondent without its accompanying goodwill, thereby enabling the petitioners to hold the 1st respondent to ransom at their whims and fancies;

(c) the petitioners took active steps to prevent the 1st respondent to seek legal recourse in appointing and paying its solicitors to file proper legal proceedings not only to recover its trademarks but also to defend itself in these proceedings;

(d) the petitioners embarked on a series of acts to undermine the financial position and business of the 1st respondent, by attempting to prejudice the 1st respondent's banking facilities with RHB Bank and purporting to terminate the tenancy of one of the 1st respondent's long established retail outlets. The petitioners paid no regard whatsoever to their duties as directors of the 1st respondent and accordingly created the very discord and tenuous circumstances that they in fact complained of; and

(e) the petitioners were discovered to have committed financial irregularities involving the funds of the 1st respondent and sought to prevent these matters from coming to light by filing these winding up proceedings;

Having regard to all the circumstances of the case, the court is satisfied on the balance of probabilities, that the petitioners are the author of the events and incidents complained of. The court concludes that it is plain and obvious that the whole basis of the petition is predicated on the petitioners' own "unclean" conduct and the petition is clearly an abuse of process and ought to be struck out with costs. In *Re Martin Coulter Enterprises Ltd.* [1988] BCLC 12 (as cited in *Re Company* [1991] BCLC 235), Vinelott J. held:

> The power to strike out a proceeding on the ground that it is an abuse of process of the Court is founded on the principle that parties are not to be harassed by frivolous, vexatious or hopeless litigation.

The filing of the present petition by the petitioners shows that they have proceeded to usurp the 1st respondent's valuable property (ie, the trademarks) and committed other breaches of fiduciary duty as directors of the 1st respondent. They cast serious doubt as to the true intent of the petitioners in filing the present winding-up petition against the 1st respondent and strongly suggest that the said petition is in fact part of a plan to impede or frustrate the 1st respondent in pursuing legal recourse for wrong doing to it by the petitioners. The petitioners' case consists of matter of management decisions where there are only differences of opinion and there is no intrinsically unfair dealing or lack of probity in the management of the 1st respondent. The petitioners cannot complain that a decision is unfair on them merely because they are in the minority in the making of such a decision. They have not remotely been able to demonstrate that any such decision is against the interest of the 1st respondent whilst specifically favoring any of the respondents, (see: *Dato' Low Mong Hua v. Banting Hock Hin Estate Co. Sdn. Bhd. & Ors* [2003] 6 AMR 245).

1st respondent - Ongoing Concern

The 1st respondent's business is profitable and expanding. The 1st respondent today is a large commercial and business concern and is in fact the largest chain of confectionery retail outlets in Malaysia, with over 50 retail outlets and more than 800 employees. There is no actual deadlock in the management of the 1st respondent. The petition is the petitioners' knee jerk response to the Trademarks Suit. It is totally devoid of substance and merits. There is no evidence to suggest that the 1st respondent has been unable to operate normally notwithstanding the efforts of the petitioners to do otherwise. The petitioners as disgruntled or unhappy shareholders ought to have sought a reasonable departure from the 1st respondent by selling their shares rather than to embark on a course of events to destroy the 1st respondent.

It is a settled and well established principle that a court of equity will not make an order for winding-up of a company where there is an adequate alternative remedy available. The fact that a company is solvent and can continue to carry out its business are factors which can be considered where there is an adequate alternative remedy and where there is no actual deadlock in management.

In the present case, the petition is brought under s. 218(1)(i) of the Companies Act 1965, not under s. 181 of the same Act. The courts in England and Australia have drawn a distinction between the effect of the alternative remedies under the equivalent provisions of the just and equitable provisions of the two sections. The court have held that the winding-up order is like a death sentence of a company and is an order of last resort. On the other hand, the provisions of s. 459 of the English Companies Act 1985 (which is equivalent to our s. 181 of the Companies Act 1965) had been held to put the court more in the position of a medical practitioner presented with a patient who is alleged to be suffering from one or more ailment which can be treated by a appropriate remedy applied during the course of the continuing life of the company. In cases where the ailment can be treated then it is not appropriate for an order to wind-up the company.

(see: *Re Guidezone Ltd*. [2000] 2 BCLC 321 at p. 357; *Re a Company* (No: 00314 of 1989) [1991] BCLC 154 at p. 161; *International Hospitality Concepts Pty. Ltd. v. National Marketing Concepts Inc.* (No. 2) [1994] 13 ACSR 368 at p. 372).

In the present case:

(a) The 1st respondent is a profitable company with more than 50 outlets and 800 employees;

(b) The operations are ongoing and management continue to act. There is no actual deadlock and the petitioners are given opportunity to continue to participate;

(c) The petitioners through their daughters and daughters-in- laws have started a new company carrying out the same business.

(d) The petitioners have not availed of their right to sell their shares whether to the 2nd-5th respondents or to outsiders. Article 21 of the articles of association expressly provides that (subject to the restrictions in the articles) shares shall be transferable. The restrictions relate to art. 23 which provides that the directors may refuse to register the transfer. However,

such exercise of discretion is subject to the provisions of s. 105 of the Companies Act 1965. It is trite law that the directors are not entitled to unreasonably refuse to register a transfer of shares and the courts are entitled to interfere in such instances. In the present case the petitioners have not sought to transfer their shares and cannot speculate that the directors will not agree to the transfer.

The petitioners' difficulties which is of their own making can be resolved by them disposing off their shares without the necessity of having to wind-up the company. The petitioners ought to have filed a petition under s. 181 of the Companies Act 1965 which is the appropriate provision in this case (provided that they are able to prove their case). In the circumstances, since they have chosen to seek a winding-up of the company under the just and equitable ground, they cannot complain if they have not been able to establish their case for a winding-p which must by necessity be done only as a last resort.

Conclusion

This is a case where the petitioners are trying to make a mountain of alleged inequities out of a molehill. The allegations are made in an attempt to wind-up the company under the just and equitable provision of s. 218(1)(i) of the Companies Act 1965. The petitioners have failed to discharge the burden of proof that there is a violation of their equitable rights or any established equitable principle as to why they are not bound by the company's articles of association. They have also failed to prove the existence of the legitimate expectation, the breach of which forms the basis of their Petition. The facts show that the petitioners' complaints relate to actions taken by the respondents for the benefit of the company due to the petitioners' own conduct. The petitioners are therefore the cause for the actions taken. As a result, the petitioners are not entitled to seek the aid of this court's equitable jurisdiction because they have not come with clean hands. In any event, the complaints relate to differences in domestic policies for with the courts do not interfere and are not sufficient to wind-up the company under the just and equitable provision.

Therefore, the petitions is dismissed with costs.